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BOOK REVIEW

PERCEPTIONS AND INTERPRETATIONS OF LAW FROM PAST TO PRESENT IN THE SUBCONTINENT

JAYANTH K. KRISHNAN*

Changing Concepts of Rights and Justice in South Asia. Michael R. Anderson and Sumit Guha, eds. Oxford University Press, 1988. pp. 290, \$34.95 (hardcover)

I. INTRODUCTION

What do the terms “rights” and “justice” mean in South Asia? How have these concepts changed over time? What role did the British play in shaping how the people of this region perceived issues of rights and justice? How do individuals and groups today in South Asia interpret their rights and liberties and do they believe they are living under a just system of laws? These are some of the various queries that a relatively recent book entitled *Changing Concepts of Rights and Justice in South Asia* seeks to investigate. *Changing Concepts* brings together scholars from diverse backgrounds, each offering a distinct perspective on the interplay between law, justice, and human rights. Ultimately the book leaves certain questions unanswered, but it is nonetheless a good read and a definite contribution to the academic literature.

Because this volume includes almost a dozen different entries, I shall provide in the next section a detailed review that comprises nearly half of this essay. More frequently than not, such works of this type tend to receive only cursory reviews before being subjected to a series of critiques. I fortunately am able to avoid this pitfall because of the space allocation this journal has graciously granted to me. With this said, though, upon completion of my review I then proceed to comment on and rigorously evaluate several of the commentators’ arguments in section three.

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II. AN OVERVIEW OF CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA

In the introductory chapter, Michael Anderson and Sumit Guha, the editors of the book, lay out the goals they have for this study. For far too long, observers of South Asian legal history—whether they are legal academics, historians, or anthropologists—have been confined to their academic sub-specialties when trying to document how concepts of law, justice, and rights have evolved in this region.¹ An important objective of the editors is to incorporate an interdisciplinary approach to the study of legal history in South Asia, which also recognizes the nuances and complexities that inherently accompany such a project.² From the outset they are critical of past oversimplifications and sweeping generalizations. In particular, “studies of legal concepts [in South Asia] from the 1950’s to the early 1980’s continued to rely to a large extent on the grand binary distinctions – status/contract, tradition/modernity, East/West, law/custom, and alien/indigenous – which underpinned nineteenth-century colonial scholarship.”³ As Anderson and Guha state, “such simplistic contrasts were largely discredited for their theoretical and empirical inadequacies.”⁴

The editors make it clear that they are interested in including a more profound comprehension of human rights from both a top-down and, perhaps more importantly, a bottom-up perspective.⁵ They insist that any legal historiography of human rights in South Asia must include the multi-dimensionality of societal culture as well as approaches that take into account Marxian, feminist, and subaltern perspectives.⁶ To their credit, Anderson and Guha believe that while we must be sensitive to those distinct traits of culture that penetrate and influence communities, we also need to have a comparative understanding of what *rights*, *justice*, and the *rule of law* mean to people in different societies.⁷ Readers will pick up from this introductory chapter that the editors are not striving to develop a universal, “high” theoretical framework. Instead, Anderson and Guha are merely seeking to inject a more diverse

1. MICHAEL R. ANDERSON & SUMIT GUHA, *Introduction*, CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA 2 (Michael R. Anderson & Sumit Guha, eds., 2000).

2. *Id.* at 3-4.

3. *Id.* at 3.

4. *Id.*

5. *Id.* at 5, 10.

6. *Id.* at 2.

7. *Id.* at 6.

array of perspectives onto a subject that historically has been viewed through narrow lenses.

In chapter two, Sumit Guha details how concepts of rights and justice manifested themselves among different social classes primarily in eighteenth century western India. Specifically, Guha documents the development of rights in the state of Maharashtra.⁸ Guha's main argument is that in this region, individuals had different types of rights and entitlements depending upon who they were, their status within the society, and the political and social norms that existed at that time.⁹ While he concedes that these ideas are not novel, one of his more important observations is that contrary to conventional wisdom, customary law, which so frequently served as the basis for maintaining a community's hierarchical structure, was always "subject to contest and redefinition."¹⁰

Guha suggests that while Maharashtra's population was diverse during the eighteenth century—economically, politically, religiously and socially—the interaction among the people within this society had a definite structure and order.¹¹ Relationships among the various social groups were shaped by a complex web of power, rights, and authority that different players possessed vis-à-vis one another. To illustrate this point Guha provides several brief case studies describing the relationships and conflicts that existed over: rights to land and office,¹² rights in the household,¹³ rights of creditors and debtors,¹⁴ and rights of the state to use its power.¹⁵ Ultimately Guha concludes that in each of these cases, when people asserted their rights and clamored for justice, the sources they drew on to argue their claims did not come primarily from traditional religious principles, historical scriptures, or antiquated notions of custom and culture.¹⁶ Rather, the manner in which individuals expressed their demands was influenced by their social

8. Sumit Guha, *Wrongs and Rights in the Maratha Country: Antiquity, Custom, and Power in Eighteenth-Century India*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 14 (Michael R. Anderson & Sumit Guha, eds., 2000).

9. *Id.* at 25-26.

10. *Id.* at 26.

11. *Id.* at 16-18.

12. *Id.* at 16-19.

13. *Id.* at 20-33.

14. *Id.* at 23-24.

15. *Id.* at 24-25.

16. *Id.* at 15-18, 26.

position within the community and the relevant political structure that was present.¹⁷

In chapter three, Radhika Singha analyzes the type of criminal justice that existed in the holy city of Banaras between 1781-1795.¹⁸ She focuses specifically on the Banaras Zamindari, an area administered by a regional landowner who was responsible for collecting and paying taxes to the British. The starting date of her study is 1781, because it was in this year that there was a major anti-British uprising in this city. The year 1795 is used as the ending point, for by this time the British had formally established their judicial power over the indigenous population.¹⁹

Singha carefully documents how during this period several important transformations occurred within the Banaras legal system. For one thing, the British East India Company (Company), which at this time was in charge of the daily administration of India, began to supplant the powers of local rulers with courts (*adalats*) and police authorities who would report directly to Company officials.²⁰ These British institutions incorporated certain "western" principles into their criminal court proceedings that elicited the disdain of the indigenous elites. For instance, requiring all witnesses to take an oath before giving testimony and testifying as to the truth of a criminal matter without proper regard to their status, relationship to the parties, or of their willingness to testify, gave rise to complaints that this eroded the elites' stature vis-à-vis their social inferiors, since there was no special deference or special treatment accorded to different classes.²¹

The most interesting part of Singha's analysis involves the dialectical nature between Islamic and Hindu law on the one hand and

17. *Id.* at 24 (noting perhaps, not surprisingly, that the "wealthy and powerful had (and have) more right than the lowly and the poor").

18. Radhika Singha, *Civil Authority and Due Process: Colonial Criminal Justice in the Banaras Zamindari, 1781-1795*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 30 (Michael R. Anderson & Sumit Guha, eds., 2000).

19. *Id.* at 31.

20. *Id.* at 33. Readers should keep in mind that for a long period of time the British East India Company (Company) was in charge of running India. The Company, while ultimately answering to the British government, nevertheless governed India quite independently until about the mid-1800's. For centuries, India was a confederation of small princely states each ruled by an elitist set of officials. One of the classic tactics the Company used to establish its authority was to form alliances with these local rulers and then "two-time" these partners by striking deals with other local authorities, all in an effort to divide and conquer these petty regimes. For a detailed discussion of how the Company operated, see generally SUNIL KHLNANI, *THE IDEA OF INDIA* (1998); STANLEY WOLPERT, *THE NEW HISTORY OF INDIA* (2000).

21. Singha, *supra* note 18, at 38.

the way the Company administered its legal system on the other. From Singha's study we learn that the British viewed the indigenous criminal justice procedure—which often was influenced by either customary practices or religious law—as incompatible with notions of fairness and justice.²² For example, Singha describes the case of a set of grandparents who asked that the murderers of their grandchild have “the nose and arm of each offender be cut off.”²³ Similarly, she also discusses how the British objected to the Islamic practices of gathering evidence in a criminal case and dealing with instances of individuals involved in adultery.²⁴

Yet British efforts to substitute these indigenous traditions with their own set of values and ideas resulted in an interesting development. In order to shape the law in a manner in which the local population could relate, the British attempted to incorporate their western legal principles together with existing Islamic and Hindu laws. What emerged was an amalgamated form of Anglo-Muhammedan law and Anglo-Hindu law.²⁵ We learn from Singha's account that in spite of their desire to bring about a more uniform, “fair” system of criminal justice, the British ultimately had to make important concessions to the customary practices of the Banaras Zamindari, in order simply to maintain some semblance of legitimacy among the general community.²⁶

In chapter four, Sandria Freitag offers an illuminating case study of the *Sansiahs*, “a peripatetic group who ‘wandered’ across north India often extracting through guile and force a surplus from peasant society” during the nineteenth century.²⁷ Freitag describes how the British initially tolerated the Sansiahs despite the latter's frequent dacoit-like behavior.²⁸ The reason was simple. In return for providing the British with useful information that helped the Raj further its political and legal goals, the Sansiahs were treated differently than other criminal associations and received a certain

22. *Id.* at 41-42 (noting that the British condemned the occasional Islamic practice of avoiding retaliation of a murderer whose family asked for a pardon).

23. *Id.* at 43.

24. *Id.* at 49-61.

25. For a detailed discussion of this subject, see Marc Galanter and Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 38 *ISR. L. REV.* 98 (2000).

26. Singha, *supra* note 18, at 53-55 (noting that one particular concession that the British eventually came to accept, and even rely on, coerced confessions that were made by a defendant).

27. Sandria Freitag, *Sansiahs and the State: The Changing Nature of ‘Crime’ and ‘Justice’ in Nineteenth-Century British India*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 82 (Michael R. Anderson & Sumit Guha, eds., 2000).

28. *Id.* at 88.

set of implied rights and benefits.²⁹ However, as time passed the relationship between the Sansiahs and the British changed. The special status and rights allocated to the Sansiahs started to discontinue. As the British sought to strengthen their hold they increasingly began to view the Sansiahs more as criminal organizations than anything else.³⁰

Yet as Freitag eloquently explains, the British pursued a criminal justice policy that made it difficult to crack down on groups such as the Sansiahs. As she notes, British officials in India:

posited an important distinction between individual crime, to be treated under the 'rule of law' formulated through the Criminal and Penal Codes developed between 1830 and 1860, and the crime committed by collectivities [like the Sansiahs] for which the nomenclature of the 'criminal tribes'—and the infrastructure of the Criminal Tribes Act of 1871—was developed.³¹

This two-track policy was mainly followed because it allowed the British to quarantine criminal groups on agrarian settlements.³² The British hoped, with this policy, that ultimately they could co-opt relocated criminal groups to serve as allies against an emerging Indian urban elite that threatened to undermine the colonial authority.³³

However, this policy was not effective for obvious reasons. Trying to determine the conditions when individuals within the group—as opposed to the group itself—should be sanctioned was painstakingly complicated.³⁴ In addition, mobilizing these new agrarian populations to adhere to British political plans was far from easy. Attempting to change the identity of groups like the Sansiahs, by seeking to alter perceptions of justice and rights through political and legal means never fully garnered the necessary energy to be successful.³⁵ The most intriguing part of Freitag's discussion, relates to her comments about how this historical case study ties into the current controversies involving individual versus collective rights in India.³⁶ She notes that the approach taken by the British in interpreting rights and structuring their criminal pro-

29. *Id.* (noting that "to the extent that the [Sansiahs'] ties were predatory in nature, however, they were justified by reference to the service Sansiahs rendered to their patrons"). *See id.* at 89-92.

30. *Id.* at 92.

31. *Id.* at 96.

32. *Id.*

33. *Id.* 98-107.

34. *Id.* at 101-07.

35. *Id.* at 107-08.

36. *Id.* at 83, 108.

cedure code during the 1800s may be directly connected to the current challenges against claims that non-Hindus are making on the state and on society.³⁷

G. Arunima's study of the Nayar community in Malabar sheds light on the dichotomous power dynamics that inhered in the matrilineal system of kinship prevalent in this community during the nineteenth-century.³⁸ As she notes:

On the one hand, matrilineal kinship implies that women are central to this system because descent and inheritance are traced through them. The personal and property rights that women possess with this system are greater, and more varied, than those held by patrilineal women. On the other hand, an examination of the rights of the matrilineal Nayar women in the nineteenth-century points to the circumscription of precisely these areas of power.³⁹

Her argument is that prior to the British involvement in the matrilineal household (*taravad*) in the 1800's, women's rights in the Nayar community were an extremely complicated issue. Historically the norms and customs that characterized the *taravad* were unstructured, contradictory, but still self-enforcing.⁴⁰ For example, while gender differences were less of an issue in terms of property law and in some family law matters, traditional Nayar women still did not possess a full set of political rights equivalent to those of men.⁴¹

The British introduction of an Anglo-Indian set of laws changed the matrilineal legal system of the Nayars. Influenced by various "Brahmanical principles" that tended to view societal relations—among other ways—in terms of gender, these Anglo-Indian laws brought a new type of duality to the role of women within society.⁴² True, as Arunima contends the British introduced a different normative dimension to the discourse that emphasized "monogamous marriages, conjugal co-residence and nuclear families with shared property rights."⁴³ There was also an attempt to transform "social

37. *Id.* at 108.

38. G. Arunima, *A Vindication of the Rights of Women: Families and Legal Change in Nineteenth-Century Malabar*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 114-15 (Michael R. Anderson & Sumit Guha, eds., 2000).

39. *Id.* at 115.

40. *Id.* at 116-118.

41. *Id.* at 117-118.

42. *Id.* at 125.

43. *Id.* at 134.

values and conventions"⁴⁴ by drawing on concepts of modernity and western legal thought.

But at the same time Arunima demonstrates how the traditionally matrilineal system of the Nayar community was in fact superceded by a more patriarchal structure. For instance, individual rights, historically defined in terms of patriarchy, were emphasized with the effect of limiting certain property rights of women.⁴⁵ Also, the legal discourse used by British-administered courts tended to use language implying a male bias.⁴⁶ Subsequently, women's rights in the household were altered as consequence of this new amalgamated set of laws.⁴⁷ Arunima's overall point is that as the matrilineal system had its share of complexities in terms of the rights women possessed, the British influence similarly had a paradoxical impact on how women were treated during the late 1800s.

Archana Parashar continues with this theme of gender justice in her essay on Christian personal (family) laws in India.⁴⁸ In this study, Parashar argues that the colonial practice of incorporating English law onto Indian Christian family matters did little to lay the foundation for women's rights in contemporary India.⁴⁹ She rejects the notion that the British, by bringing western principles into the personal law matters of Indian religious communities, sought to raise the status of women and preserve the sanctity of religious values. She details, for example, how the Indian Divorce Act of 1869, which was a British measure affecting the rights of Christians, failed to either ensure gender equality or to provide for the meaningful expression of religious rules.⁵⁰ Similarly, the Indian Succession Act of 1865 also failed to effectively recognize women's rights with respect to the inheritance of property.⁵¹ The thrust of her argument is that the impact of the colonial legacy on personal law

44. *Id.*

45. *Id.* at 131 (noting that in property disputes "in the 1870s and 1880s . . . women could . . . [assert claims] only if they represented 'the family,' and thus a collective interest.").

46. *Id.*

47. *Id.* at 125-31.

48. Archana Parashar, *Do Changing Conceptions of Gender Justice Have a Place in Indian Women's Lives? A Study of Some Aspects of Christian Personal Law*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 140 (Michael R. Anderson & Sumit Guha, eds., 2000).

49. *Id.* at 141.

50. *Id.* at 147. See also, Galanter & Krishnan, *supra* note 25 (describing in detail the history and ramifications of the British influence of personal law on modern Indian society).

51. Parashar, *supra* note 48, at 154.

issues continues to adversely affect Christian women in contemporary India.⁵²

Parashar recommends that the modern Indian state needs to undertake a set of substantive policy changes if gender justice is ever to be fully recognized. She believes that matrimonial property law reform is one of the first steps that the government must initiate in order to achieve this goal.⁵³ According to Parashar, where there is a divorce, it is absolutely crucial that property “be distributed equally between both partners.”⁵⁴ In addition, Parashar argues that the state ought to enact legislation permitting the dissolution of a marriage on the grounds of “irretrievable breakdown.”⁵⁵ She acknowledges that there are several potential objections to this latter proposal, and to her credit she pays sufficient time explaining each of these possible critiques. But she eventually concludes by suggesting that what cannot be forgotten is that far too often women are forced to stay in marriages because of a financial dependence on the spouse. For Parashar, legislation adopting an “irretrievable breakdown” standard as well as detailed, meaningful property law reform are essential if women are really to have gender justice in family law matters.⁵⁶

In chapter seven Radha Kumar examines the impact of British Indian penal law on twentieth century Bombay. Specifically she investigates those provisions dealing with kidnapping and adultery and how they intersected with religious personal law to form the basis of a highly complex social structure within this society.⁵⁷ Kumar focuses her attention on community mill-workers since this working population consisted of immigrants from other parts of South Asia. A hypothesis she considers is whether, given the demographics of Bombay, the ancient social and religious norms that contributed to the patriarchal social structure in other parts of the country were as prevalent within this type of “plural” society.

52. *Id.* at 164. The literature on personal law in India, on not only Christians but Hindus and Muslims, is voluminous. For a sample of insightful readings, see RELIGION AND PERSONAL LAW IN SECULAR INDIA (Gerald Larson, ed., 2001), IN THE NAME OF JUSTICE: WOMEN AND LAW IN SOCIETY (Swapna Mukhopadhyay, ed., 1998), J. DUNCAN M. DERRETT, RELIGION, LAW AND THE STATE IN INDIA (1968); John H. Mansfield, *The Personal Laws or a Uniform Civil Code?* in RELIGION AND LAW IN INDEPENDENT INDIA (Robert Baird, ed., 1993).

53. Parashar, *supra* note 48 at 171.

54. *Id.*

55. *Id.* at 165.

56. *Id.* at 169-72.

57. Radha Kumar, *Sex and Punishment Among Mill-Workers in Early Twentieth Century Bombay*, in CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA 179 (Michael R. Anderson & Sumit Guha, eds., 2000).

By relying on an impressive array of archival records, Kumar describes how in fact, women during this period were often caught between an existing British Indian legal system that only on its face provided them with increased rights, and a traditional, long-standing socio-legal culture that rejected concepts of gender equality and gender justice.⁵⁸

Kumar offers highly researched accounts of cases where women and girls were treated quite arbitrarily by the British courts; in certain instances she notes that the courts occasionally protected female rights, while at the same time she also uncovers how these institutions repeatedly failed to crack down on the tradition of adult men marrying very young girls.⁵⁹ Kumar describes the intractability of the traditional customary structure by noting several instances of women being exposed to horrific acts of mutilation by their husbands who suspected them of adultery.⁶⁰ While the written British Indian penal law prohibited such behavior, Kumar argues that between 1926 and 1942 the British "courts seemed neither to have progressed from their idea of deterrence [of such customary behavior] nor to have succeeded in deterring."⁶¹

R.S. Khare, in his chapter on untouchable women, provides an ethnographical account of the continuing struggles these individuals face in modern society.⁶² Khare's study relies heavily on interviews he conducted of untouchable women as evidence of the high levels of discrimination that still are present against this group at home, in the work-place, in the political arena, and religious circles.⁶³ We learn from their own words that untouchable women continue to be physically abused by their spouses, ignored by the community at large, and left out of what they perceive to be primarily a middle-class women's movement.⁶⁴ As Khare discovers, there is a great deal of sadness and resignation that has become almost a fixed characteristic among untouchable women.

58. *Id.* at 178-181, 192-95.

59. *Id.* at 184 (noting that the "British themselves appear to have had difficulty in regarding Indian girls of twelve or thirteen as children rather than sexually mature.").

60. *Id.* at 190.

61. *Id.* at 191.

62. R.S. Khare, *Elusive Social Justice, Distant Human Rights: Untouchable Women's Struggles and Dilemmas in Changing India*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA 198* (Michael R. Anderson & Sumit Guha, eds., 2000). His study specifically focuses on untouchable women in the state of Uttar Pradesh.

63. *Id.* at 214 (noting that "the denial of rights and justice to these women in found deeply rooted in interlocking social, religious, political and economic spheres.").

64. *Id.* at 206-16.

Paradoxically, though, while the situation for this group remains bleak, untouchable women are not completely helpless. James Scott's important work some years back on Malaysian peasants argues that the poor and oppressed do have a limited arsenal with which to defend themselves.⁶⁵ Similarly we learn from Khare's study that untouchable women:

suffer yet rebel and devise rational strategies to secure a more favorable (and just) social outcome for themselves and their families. Their struggle for justice, like their social world, revolves around their households (i.e., their children and the aged, with or without their husbands). They endure . . . physical beating and domestic abuse 'only for [their] family's sake and its welfare.'⁶⁶

Khare finds that one way untouchable women "rebel" is by instrumentally using religion—particularly the ancient Hindu concepts of karma and dharma—as a means of conceptualizing notions of rights and justice.⁶⁷ There is a sense among these women that their struggles will be recognized, whether by those in this life or by a higher power in the next, and Khare shows that this reconfiguration and interpretation of religion plays an important role in this perception.⁶⁸

In the following chapter Jani de Silva explores what justice means to schoolchildren who have experienced the terrible violence that has engulfed Sri Lanka over the past twenty years.⁶⁹ De Silva specifically focuses on how the uprising of the Sinhalese-based Janatha Vimukthi Perumana (JVP) between July 1987 and December 1989 affected these students' perceptions of law, governance, justice and civil liberties.⁷⁰ Since the 1980s, the Sri Lankan state has been in a battle with militant Tamil separatists who primarily have been situated in the north-eastern corner of the island. The majority ethnic community of Sri Lanka is Sinhalese Buddhist, and despite the state's attempts at putting down the Tamil rebellion, many groups within the Sinhalese community, including the JVP,

65. JAMES SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (1985).

66. Khare, *supra* note 62 at 207.

67. *Id.* at 215.

68. For another study that examines how groups use religion as a motivating factor to have their rights recognized, see generally Jayanth K. Krishnan and Kevin den Dulk, *So Help Me God: Explaining the Recent Rise in Religious Interest Group Litigation in the U.S. and Beyond*, 30 GA. INT'L & COMP. L. 233 (2002).

69. Jani de Silva, *The Ethics of Struggle: Changing Political Perceptions Among Secondary School Students in Southern Sri Lanka*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 220 (Michael R. Anderson & Sumit Guha, eds., 2000).

70. *Id.* at 221-223.

have expressed 'extreme dissatisfaction with the various governments' responses.⁷¹ In 1987, this growing hostility towards the government by the JVP came to a head with the result being a nearly two year armed struggle between state forces and JVP militants.

De Silva documents the impact the JVP revolt had on a sample of secondary students; his findings suggest that many of his interviewees were torn over the conflict. To a certain extent the students indicated that they believed the state had a duty to preserve law and order.⁷² Yet many were also sympathetic to the frustrations of the JVP. As we learn from the respondents' comments there was a sense that the JVP had legitimate concerns that simply were not being "fulfilled by the state."⁷³ In addition, the students also believed that several tactics employed by both the state and the JVP frequently crossed the line and went well beyond what was right or just.⁷⁴ Perhaps most interesting to de Silva (and the reader) was that the students, while at times hopeful and even slightly optimistic about the future, maintained a complacent and accepting attitude that regardless of who was in power, occasional abuses of civil rights by the state were a fact of life in Sri Lanka.⁷⁵

The penultimate chapter by Pritam Singh examines the issue of human rights in the post-colonial state of Punjab.⁷⁶ Despite having a definite polemic tone to it, this chapter comprehensively addresses issues of sectarianism in Punjab and how excessive attachments to religion have affected individual rights and notions of justice in this state.⁷⁷ Singh artfully describes how in the discourse of human rights, leaders within Punjab have used sectarianism in a calculated, instrumental manner in order to mobilize supporters and demonize opponents.

For example, in the late 1960s and through the mid-1970s a Maoist movement led by a group known as the Naxalites sought to

71. For other selected works on this topic, see generally ROHAN GUNARATNA, *SRI LANKA: A LOST REVOLUTION? THE INSIDE STORY OF THE JVP* (1990); SRI LANKA: *COLLECTIVE IDENTITIES REVISITED* (Michael Roberts, ed., 1997); PRINS GUNASEKARA, *A LOST GENERATION: SRI LANKA IN CRISIS: THE UNTOLD STORY* (1998); Siri Gamage, *Radicalization of the Tamil Middle Class and Ethnic Violence in Sri Lanka*, 24 J. CONTEMP. ASIA 161 (1994).

72. De Silva, *supra* note 69, at 228-34.

73. *Id.* at 228-29.

74. *Id.* at 235-37.

75. *Id.*

76. Pritam Singh, *Sectarianism and Human Rights Discourse: The Politics of Human Rights in Post-Colonial Punjab*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 239 (Michael R. Anderson & Sumit Guha, eds., 2000).

77. *Id.* at 244-49.

undermine the government of the Sikh Akali Party-led coalition.⁷⁸ Singh describes that brute force as well as propaganda were important tools of the government's campaign against this rebellion. "The emphasis of the publicity campaign was to present the Naxalites in a depoliticized form by projecting them as anti-social criminal elements who were bent upon disturbing societal peace and social stability."⁷⁹ The goal was to present the enemy as less than human and therefore not entitled to protection of basic human rights.⁸⁰

This technique, as Singh describes, was not unique to the Akali-Naxalite conflict. Other movements such as the Hindu nationalist movement and a Sikh military uprising, faced similar tactics by governments seeking to de-legitimize those who posed a threat to their rule.⁸¹ Conversely, these various movements also used the language and discourse of human rights in a stilted, biased way, with the hope of garnering support from potential sympathizers. Singh's eventual conclusion is that human rights need to be a universal concept that is not subject to the arbitrary whims of those in power. Only by valuing the intrinsic worth of how individuals ought to be treated will we ever come close to recognizing the true meaning of the term human rights.⁸²

The final chapter by Nilanjan Dutta continues with the theme of human rights by arguing that this issue needs to become an ideology that is supported and practiced on the grassroots level.⁸³ According to Dutta, in India "the post-colonial state . . . has continued to subvert these rights with the same ferocity as its colonial predecessor . . ."⁸⁴ Dutta contends that only through a civil society that vigilantly protects individual rights and liberties, can we be sure that democracy remains vibrant and free from government oppression.

Dutta's analysis traces the consciousness of civil liberties among the body politic, first during colonial times.⁸⁵ He shows that during this period the educated elite within Indian society thought of

78. *Id.* at 251-52.

79. *Id.* at 253.

80. *Id.* at 263.

81. *Id.* at 254-63.

82. *Id.* at 241, 263.

83. Nilanjan Dutta, *From Subject to Citizen: Towards a History of the Indian Civil Rights Movement*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 275 (Michael R. Anderson & Sumit Guha, eds., 2000).

84. *Id.* at 277.

85. *Id.* at 277-80.

civil liberties primarily in terms of equal opportunity in the workforce, freedom of the press and equality before the courts.⁸⁶ As time went on, Indians began clamoring for more rights, with the eventual result being a call for independence. Dutta observes that since 1947, however, leaders within India have failed to preserve the principles of freedom that were the foundation of the struggle for Independence. He cites various periods in post-Independent India where the state on several occasions has undemocratically cracked down on the civil rights and civil liberties of opposition movements.⁸⁷ Dutta offers an overview of some of the more important organizations and social movements that have attempted to stand up for individual freedom, but he concludes that such social activism needs to be consolidated and more bottom-up pressure from politically conscious citizens is needed – or else the democratic experiment in India is doomed to failure.⁸⁸

III. EVALUATION AND CRITIQUE OF *CHANGING CONCEPTS*

The edited volume that Michael Anderson and Sumit Guha offer is one that should be read by those interested in notions of law, rights, and justice in the subcontinent. The book provides an array of perspectives and important historical insights, the latter being an especially refreshing aspect considering the magnitude of the issues involved. Furthermore, the inclusion of how culture, feminist thought, class, and politics affect the development of law is an extremely valuable aspect to this volume. Clearly the contributors are all well-read scholars and the ambition of this project is something that should be both recognized and praised.

With this said, however, there are a few general critiques I have of this book, as well as several more specific comments on a number of the respective chapters. In terms of the general observations it is true that the editors, from the outset, note that the purpose of this book is not to set forth an all-encompassing legal theory that is applicable in every environment. In an era when many scholars are constantly proclaiming “eureka,” such candor is certainly appreciated. But at times I struggled even to find the slightest connection between some of these very diverse studies. Certainly, notions of rights and justice are discussed in each of the chapters.

86. *Id.* at 277.

87. *Id.* at 280-87.

88. The groups include the Association for the Protection of Democratic Rights, the Citizens for Democracy, The People's Union for Civil Liberties, and the People's Union for Democratic Rights.

Nevertheless, a clear, even middle-range, theoretical nexus that could bring together these works was never lucidly and adequately presented.

In addition, the title of the study intimates that the project seeks to understand the changing aspects of rights and justice in South Asia. As the editors and contributors know, South Asia consists of India, Pakistan, Bangladesh, Sri Lanka, and Nepal at the very least, with Bhutan, Maldives, and even Afghanistan being included as part of the area for most observers as well. Most of the pieces, though, in this book deal primarily with India. Prior to 1947, British India included what is today Pakistan and Bangladesh; therefore it is obviously more excusable to allow the particular contributors whose studies are placed in that era to discuss matters that center on "India." But since this volume is not restricted to the pre-Independence period, it is a shame that more attention is not given to the discourse of rights in other South Asian countries.

Additionally, we are never really given a sense of why these specific studies, as opposed to others on different topics involving rights and justice in South Asia, are included within this volume. We are told that this project grew out of a conference in New Delhi during the mid 1990s, but the question of *why* a meeting of scholars necessitates a book of this nature is an assumption made without explanation. The fact that this question is not answered, combined with the lack of a theoretical connection tying the chapters together, explains why certain important aspects regarding rights and justice are not addressed by this book.

For example, one key issue that constantly plagues the legal system, particularly in India, is that its judiciary has one of the world's worst systems of case-backlog.⁸⁹ In the Indian Supreme Court, observers have noted that over 20,000 petitions are awaiting adjudication.⁹⁰ One frequent explanation for why such a backlog exists relates to the fact that Article 32 of the Indian Constitution allows people to directly submit writ petitions to the Supreme Court in

89. See CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 82-83 (1998); Bibek Debroy, *Losing a World Record*, FAR EASTERN ECON. REV., Feb. 14, 2002 available at http://www.feer.com/articles/2002/0202_14/p023fcol.html. See also, Barry Bearak, *In India, The Wheels of Justice Hardly Move*, N.Y. TIMES, June 1, 2000, at A1.

90. Debroy, *supra* note 89. See also, Epp, *supra* note 89, at 82-3 (noting that in "1990 the Supreme Court disposed of an impressive 56,343 cases; but at the end of that year 185,108 other cases still waited decision.").

matters involving the public interest.⁹¹ But in actuality the real problem is that the Indian lower courts are the centers of the greatest gridlock of cases.⁹² Cases in the lower courts are known to linger on for decades, if not generations, with the ultimate result being that basic rights are denied to millions of people.

Changing Concepts makes little mention of this enormous problem concerning rights and justice within India. Although data is scant there is some indication that on a *per capita* basis, litigation in India is quite low when compared to other countries in Asia, Europe, and North America.⁹³ The reason why people are being denied justice and protection of their rights may have less to do with the simplistic notion that Indians are somehow inherently very litigious and more to do with a multiplicity of other factors, such as the extraordinary amount of interlocutory appeals allowed by the Indian civil procedure code and also resistance by the Indian bar association.⁹⁴ Once again, though, it is a mystery how a topic of such import to the general population is not addressed in a book on rights and justice in South Asia.

In terms of more specific comments about the individual chapters, let me offer a few observations. First, regarding Sumit Guha's piece, I am intrigued by his argument that social status contributed to the power dynamic in eighteenth century Maharashtra, more so than ancient customs and religious traditions passed down through the years. Yet why Guha seems to suggest that the two concepts—power and tradition—need to be mutually exclusive is unclear to

91. INDIA CONST., art. 32 (1950) (noting "the right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by this Part is guaranteed. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warrant* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.").

92. See Debroy, *supra* note 89, (noting that "3.2 million [cases are sitting] in the High Courts and 20 million in lower or subordinate courts. Half a million cases in the High Courts have been on hold for 10 years or more, and almost 1 million in the lower courts.").

93. See, e.g., Christian Wollschlager, *Exploring Global Landscapes of Litigation Rates*, in SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60. GEBURTSTAG (Jurgen Brand & Dieter Stempel, eds., 1998) (Since no national figures are available for India, Wollschlager uses the state of Maharashtra for his comparison. Of course, several caveats need to be made, including the fact that he looked only at a single state for one ten year period, and that the Indian adult population of Maharashtra's is comparatively low.). See also KATHARINE PISTOR ET. AL., THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIA ECONOMIC DEVELOPMENT 1960-1995 246 (1999); Robert Moog, *Indian Litigiousness and the Litigation Explosion*, 33 ASIAN SURVEY 1136, 1138-39 (1993). See generally ROBERT MOOG, WHOSE INTERESTS ARE SUPREME: ORGANIZATIONAL POLITICS IN THE CIVIL COURTS IN INDIA (1997) (noting that filings dropped in the state of Uttar Pradesh from 1.63 per thousand persons in 1951 to .88 filings per thousand persons in 1976).

94. See Debroy, *supra* note 89.

me. Many years back Alvin Rabushka and Kenneth Shepsle persuasively argued that the instrumental goals of ethnic groups are defined by how they use concepts of culture, traditionally embedded social norms, and existing power structures.⁹⁵ Benedict Anderson's classic work on imagined communities demonstrates how the ability of elites to control discourse and shape history allow the reality (and eventually the destinies) of a people to be socially constructed by those in power.⁹⁶ Therefore, Guha's pitting of custom and ancient norms against the forces wielded by those with social and political control may be somewhat overstated.

Radhika Singha's account of British rule in Banaras during the late 1700s is highly thoughtful and well-researched. Her thesis that the British had to make concessions to the local customary traditions of the indigenous population in order to maintain power, despite the Raj's attempt to incorporate western values of justice into the legal system, illustrates the complexity of colonial rule. My only question is whether this British acquiescence was all that unique to India. One example that comes to mind is the manner in which the British administered personal law in the Middle East following World War I. In that situation, the British permitted the *millet* system inherited from the Ottoman Empire to continue; whereby each religious community was granted a great deal of latitude to administer its own set of laws governing such areas as marriage, divorce, adoption, and the like.⁹⁷ And as in India, one important reason why the British conceded to this indigenous practice in the Middle East was because it was a way to maintain some degree of legitimacy. Had Singha placed her study into a more comparative context, this similarity would certainly have been highlighted.

The issue of personal law is a subject also addressed in Archana Prashar's chapter. Parashar notes that the British influence on Christian personal law has had a resounding effect on the post-colonial rights of non-Hindu groups in India. Similarly, Sandria Freitag contends in her study of the nineteenth century Sansiahs

95. See, e.g., ALVIN RABUSHKA & KENNETH SHEPSLE, *POLITICS IN PLURAL SOCIETIES* (1972) (Among many students of cultural pluralism, this book is cited frequently as a classic volume on instrumentalism and ethnic group behaviour.).

96. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (1983) (noting, in particular, that elites use the media as a main tool for constructing reality). For another important classic that treats this topic in a sensitive manner, see PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966).

97. See generally Galanter and Krishnan, *supra* note 25.

that state action during that period has helped to influence the identities of communities and individuals in modern day India.

Neither of the authors really offer much detail as to *how* such historical influence has manifested itself today. To be sure, Freitag cites the *Mandal* and *Shah Bano* cases, two key modern Indian Supreme Court decisions; the former dealing with government benefits for lower caste citizens while the latter relates to what type of jurisdiction state courts would have over Muslim family law.⁹⁸ And Parashar does sketch out recommendations that a modern state needs to consider when trying to implement gender justice. But neither contributor presents a rigorous application of such past lessons on today's political and legal environment in India. Particularly surprising is the lack of any substantive discussion in Parashar's chapter of the landmark *Mary Roy* ruling, a case where the Supreme Court held that Christian women indeed were allowed to inherit property despite restrictions set forth in the Travancore Christian Succession Act.⁹⁹ I wish both authors had followed through on their goal of explaining the relevance of past events on present day politics; both pieces no doubt would have been clearly enhanced.

G Arunima, Radha Kumar, R.S. Khare each deal with issues relating to gender politics, but once again because a strong theoretical nexus is missing, the pieces read more like discrete entities rather than connected set of works. Arunima and Kumar illustrate the dialectical impact of the British influence on Indian notions of matrilineal structure and criminal law, respectively. Both pieces are quite thoughtful and well researched, but the main question I have is the extent to which diversity of thought existed among the women in each of these studies.

My research in India reveals that Indian women's organizations—obviously not surprisingly—have diverse sets of views that have been shaped by a variety of factors, from class to religion to issues of identity. This point about heterogeneity among various women's groups is especially seen in the debates over the hot-but-

98. *Sawhney v. Union of India (The Mandal Case)*, (1992) SCC 217 (Supp.) 3; *Mohd. Ahmed Khan v. Shah Bano*, A.I.R. 1985 SC 945.

99. *Mary Roy v. State of Kerala*, 2 SCC 209 (1986). The statute in this case outlined limitations on the types and amounts of inheritance Christian women could obtain. This was an important case because the Supreme Court ruled that it ultimately had jurisdiction over laws in the country – including religion-based personal laws. For a nice synopsis discussing this case as well as others involving Christian personal law, see Sebastian Champappily, *Christian Law of Succession and Mary Roy's Case*, (1994) 4 SCC (Jour.) 9 (1994) available at <http://www.ebc-india.com/lawyer/articles/94v4a2.htm>.

ton topic of whether India should adopt a Uniform Civil Code (UCC).¹⁰⁰ The UCC was an initiative proposed by the nationalist Bhartiya Janata Party during the early 1990s that would discontinue the practice of religious groups being allowed to use their own religious principles to govern matters relating to family law. Of course detecting such differences among the women in Arunima and Kumar's studies would be considerably difficult; R.S. Khare's work on untouchable women even seems to suggest that little dissent existed at all among his interviewees. But including such a caveat could be a useful supplement to what are otherwise three interesting reads.

The three most pronounced pieces on human rights—de Silva's chapter on Sri Lanka, Singh's work on Punjab, and Dutta's review of pre- and post-colonial India— could be a separate monograph on their own. First, in reading de Silva's chapter I felt torn. On the one hand I laud his efforts to show how the humanity of children are affected by the struggles and atrocities associated with war. At the same time, however, I was left asking several questions. For example, to what degree do the courts in Sri Lanka contribute to the disillusionment of not only children but of all citizens? What role do judges and lawyers play in how issues of civil liberties and civil rights are conceptualized – for that matter are they even important players within this environment? And given that this is a country that has seen years of military turmoil, what does justice mean for the various other individuals and groups involved in this conflict? I recognize de Silva is only trying to give us a snapshot of a particular community that has been affected, but hopefully these questions may be addressed in a later project.

In terms of the pieces by Singh and Dutta, both are intriguing and offer keen perspectives on the discourse of human rights. Singh's discussion of the Naxalite movement is particularly relevant to today's political climate in India, as a related Naxalite group in southern India has been pinpointed by human rights activists for engaging in a rather harsh form of justice.¹⁰¹ Specifi-

100. For recent works that discuss the women's movement and the relevance of this issue, see generally MADHU KISHWAR, *OFF THE BEATEN TRACK: RETHINKING GENDER JUSTICE FOR INDIAN WOMEN* (1999); MADHU KISHWAR, *RELIGION AT THE SERVICE OF NATIONALISM* (1998); FLAVIA AGNUS, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA* (1999) and *GENDER AND POLITICS IN INDIA* (Nivedita Menon, ed., 1999).

101. For reports that discuss the Naxalite conflict in Andhra as well as their summary justice practices, see <http://www.fas.org/irp/world/india/threat/naxalite.htm>; <http://www.ploughshares.ca/CONTENT/ACR/ACR00/ACR00-IndiaAndhraPradesh.html>; www.fas.org/irp/world/para/pwg.htm.

cally there are reports noting that within their guerilla held territories these particular Naxalites in the state of Andhra Pradesh are conducting "trials" of those they deem as unsympathetic to their cause—which has resulted in numerous summary executions.¹⁰² Singh's description of the tactics used by the Punjab government during the 1960s and 1970s have noticeable similarities to how state forces today are responding to the current, on-going Naxalite struggle. Regarding Dutta's argument, I agree that civil society needs to be a leading force in the preservation of civil liberties and civil rights is a theme that several western scholars have noted in the law and courts literature.¹⁰³

At the end of the day, *Changing Concepts* offers a diverse array of works that many observers will find enjoyable to peruse. The various critiques mentioned above should not detract from the efforts undertaken by these scholarly contributors. For too long this region and its legal regimes have gone unnoticed by western judicial scholars. Despite the various troubles that have engulfed this part of the world there still is a wonderful imagination and rich legal history to this area that *Changing Concepts* takes an important step towards highlighting. Particularly useful is the book's attention to the different dimensions of rights and justice during India's pre-colonial period. And also insightful are those chapters that address how the law has changed during India's (sometimes difficult) experiment with democracy. We can only hope that this volume will spur future research on the topics of rights and justice in South Asia.

102. See <http://www.fas.org/irp/world/india/threat/naxalite.htm>.

103. See e.g., Epp, *supra* note 89; MICHAEL MCCANN RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD ROSENBERG, THE HOLLOW HOPE (1991); Susan Olson, *Comparing Women's Rights Litigation in the Netherlands and the United States*, 28 POLITY 189 (1995); JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978).